Date: February 25, 1998

Case No.: 96-INA-00387

In the Matter of:

CAPITAL FINANCIAL & REAL ESTATE SERVICE, INC.,
Employer

On Behalf Of:

SEYED M. TARIGHATI,
Alien

Appearance: Stanley A. Cohen, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 8, 1994, Capital Financial & Real Estate Service, Inc. ("Employer") filed an application for labor certification to enable Seyed M. Tarighati ("Alien") to fill the position of Bilingual Assistant (AF 15). The job duties for the position are:

> Assist Iranian speaking customers in completing forms and documents with regard to buying and selling of commercial and residential real estate and obtaining mortgages and explaining to them the implication of such transaction. (Not responsible for quoting rates or expenses.) Communicate in English and Farsi.

The requirements for the position are a BA/BS in Accounting/Finance and two years of experience in the job offered or two years of experience in the related occupation of Bilingual Service Representative. Other Special Requirements are "Fluent in Farsi."

The CO issued a Notice of Findings on December 8, 1995 (AF 12-14), proposing to deny certification on the grounds that the degree requirement is restrictive and there are qualified U.S. workers based on a combination of education and experience. The CO did not name specific U.S. workers and cited only the regulation at 20 C.F.R. § 656.24(b)(2)(ii). The CO notified the Employer that it must reduce the job requirements or submit rebuttal, and must document with specificity why each U.S. worker is being rejected for job-related reasons.

In its rebuttal, dated January 9, 1996 (AF 9), the Employer contended that it could reduce the degree requirement or submit rebuttal. The Employer stated that the degree requirement is a business necessity "because the forms and documents are primarily financial in nature and are technical. Persons with these degrees have the ability to explain the broad implications of the financial questions and elicit responses that will best serve the interests of our customers, and help them obtain mortgage financing" (AF 9-10). The Employer further contended of the 11 responses to the advertisement, all 11 were contacted and found not qualified. The Employer stated "[i]n the event you do not accept our rebuttal, we are willing to withdraw the degree requirement and re-advertise" (AF 11).

The CO issued the Final Determination on February 23, 1996 (AF 7-10), denying certification because the Employer remains in violation of the regulations at 20 C.F.R. § 656. More specifically, the CO found the degree requirement is restrictive as the position involves

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

standard mortgage application forms which are universal throughout California. The CO also found that there are U.S. applicants qualified to perform the job duties as listed on the application who were rejected for other than lawful, job-related reasons, and specifically noted applicants Ali Gholami and Brian Aryan. The CO further found that the Employer 's offer to delete the degree requirement and readvertise is not a remedy because it would not cure the problem of qualified, available U.S. workers.

On March 27, 1996, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.20(b)(7). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Section 656.21(b)(7) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 87-INA-161 (Dec. 7, 1988) (*en banc*). Section 656.24(b)(2)(ii) states, in relevant part, that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other workers similarly employed. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

In this case, the duties required of the position are to assist Iranian clients in completing and understanding mortgage documents, and the applicants must be able to communicate in Farsi (AF 15). The CO found that there were U.S. workers qualified for the position by the nature of their training, education, and experience, and specifically noted U.S. applicants Ali Gholami and Brian Aryan. Mr. Gholami's resume notes a BS degree and work experience from 1985 to the present for Berlitz International as a Translator on an as needed basis for the INS and verbal interpretation in the court room, and from 1992 to 1994 as a Translator for international business contracts for the Ports and Shipping Organization in Tehran, Iran. Mr. Gholami's resume also shows experience as a Loan Officer and Real Estate Agent in California from 1985 through 1992 (AF 97). Mr. Aryan's resume shows work as a Translator assisting Iranian-speaking customers with forms and documents regarding governmental regulations and advice on their legal rights for Jalilvand Social Services from 1992 to the present (AF 96). The Employer rejected Mr. Gholami because "his English was difficult to understand in that he spoke very quickly and slurred his words" (AF 10). Mr. Aryan was rejected because "[w]e were left with the impression that translation served as a fill-in for this individual while he sought more appropriate employment as a project manager" (AF 10).

Clearly, these U.S. applicants meet the minimum requirements for the position, or could perform the required duties based on their training, education, and experience. Labor certification is properly denied where the applicant meets the minimum requirements for the job. *State of California, Board of Equalization*, 93-INA-42 (Dec. 7, 1993). The Employer's rejection of Mr. Gholami for poor English communication skills is not consistent with Mr. Gholami's lengthy work history as a Translator, Loan Officer, and Real Estate Agent. The burden is on the Employer to document that the applicant is unable to communicate in English. *Impell Corp.*, 88-INA-298 (May 31, 1989) (*en banc*); *Spizer, Inc.*, 94-INA-383 (Oct. 25, 1995); *Testwell Craig Labs of N.J., Inc.*, 94-INA-512 (Dec. 2, 1996). Here, the Employer has provided only its unsupported statements regarding Mr. Gholami's English skills. We find that the Employer has failed to document a lawful, job-related reason for its rejection Mr. Gholami.

The Employer has rejected Mr. Aryan because it had the impression that he would look for other employment as a project manager (AF 10). An employer may not reject an applicant for not possessing long-term interest in the position; mere suspicion of such shortcomings does not satisfy the employer's burden to document lawful, job-related reasons for rejection. *Hill-Fister Engineers, Inc.*, 89-INA-114 (Feb. 6, 1990); *Tahoe Sierra Service*, 93-INA-504 (Nov. 29, 1994). Accordingly, we also find that the Employer has failed to document a lawful, job-related reason for its rejection Mr. Aryan.

Moreover, the Employer's offer to delete the degree requirement and readvertise would not cure the unlawful rejection of these qualified U.S. applicants. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.